Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1279

RALPH H. ARABIAN, et al
Petitioners,
v.

JOHN J. DALEY, et al

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported as RALPH H. ARABIAN, et al v. JOSEPH AYOUB, et al, Case no. 78-8119. The opinion of the United States District Court for the District of Massachusetts is reported as RALPH H. ARABIAN, et al v. JOHN J. DALEY, et al, Civil Action no. 75-446-G. Three orders of the Plymouth Probate Court of Plymouth County, Massachusetts are reported as RALPH H. ARABIAN v. PATRICIA M. ARABIAN, Case no. 20404,

and dated September 8, 1971, November 13, 1972, and December 8, 1972 respectively. The opinion of the Massachusetts Appeals Court is reported as ROBERT E. SCHLICHTE v. MARIE C. SCHLICHTE, Case no. AC 74-77. The order of the Norfolk Probate Court of Norfolk County, Massachusetts is reported as ROBERT E. SCHLICHTE v. MARIE C. SCHLICHTE, Case no. 28830 and dated August 8, 1973. A copy of each opinion is attached as Appendix A, and a copy of each order is attached as Appendix B.

JURISDICTION

This petition for Writ of Certiorari results from the order of the United States Court of Appeals for the First Circuit, entered on November 21, 1978, dismissing Petitioners' application for appeal. Petitioners submit this statement in support of the jurisdiction of the Supreme Court of the United States to hear this petition and to show that a substantial federal question is presented in this petition.

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

This petition is taken by Petitioners in an effort to have certain Massachusetts statutes and rules (before the 1975 revisions) which authorize a court to award attorney's fees to women but not to men declared unconstitutional. Petitioners petition this Court from the order of the United States Court of Appeals for the First Circuit, which dismissed Petitioners' appeal. (Appendix A, p. 1a). By this order, the United States Court of Appeals for the First Circuit affirmed the judgment of the United

States District Court (Appendix A, p. 2a) which refused to rule on the validity of the statute and rule, governing attorney's fees in divorce actions in the face of Petitioners' constitutional challenge.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, providing in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Massachusetts Probate Court Rule 47 provides:

> "An application by a <u>wife</u> for an allowance to enable <u>her</u> to defend or prosecute a libel shall contain a statement that <u>she</u> intends in good faith to defend or prosecute such libel, and shall be accompanied by a certificate of <u>her</u> attorney that he believes such statement to be true. If such allowance is granted, it shall be paid as the court may direct."
> (emphasis added)

Massachusetts General Laws, Chapter 208, Section 17, prior to 1975 amendments read as follows:[1]

> "Pendency of libel; allowance; alimony. The court may require the husband to pay into court for the use of the wife during the pendency of the libel an amount to enable her to maintain or defend the libel, and to pay to the wife alimony during the pendency of the libel." (emphasis added)

QUESTION PRESENTED

The ultimate question presented is whether Massachusetts General Laws, Chap. 208, Sec. 17[1] and Massachusetts Probate Rule 47 are unconstitutional, as an invidious and arbitrary discrimination based on sex, and not rationally related to any constitutionally permissible government purpose. By the terms of the statute and rule, only a husband can be required to pay the wife's attorney's fees, but not the contrary. This distinction between men and women gives rise to petitioners' question. Specifically: Does the statute and rule violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by virtue of their absolute reliance on a gender-based

[1] MGLA Chap. 208, Sec. 17 underwent certain minor, technical changes in 1975 to eliminate all reference to sex. These changes have no bearing on the issues presented by this petition, as the orders were made prior to the 1975 amendment.

classification?

STATEMENT OF THE CASE

The proceedings against Petitioner Arabian began in Plymouth Probate Court of Plymouth County, Massachusetts, as an order against Arabian to pay his wife's attorney's fees, ordered on September 8, 1971 under the threat of imprisonment. Two subsequent orders were also filed on November 13, 1972 and December 8, 1972 respectively, (Appendix B, pp. 10a-12a). No previous agreements existed between the parties to pay the wife's attorney's fees.

The proceedings against Petitioner Schlichte began in Norfolk Probate Court of Norfolk County, Massachusetts, as an order against Schlichte to pay his wife's attorney's fees, ordered on April 4, 1973. A subsequent order was filed on August 8, 1973, (Appendix B, pp. 13a). No previous agreements existed between the parties to pay the wife's attorney's fees. Schlichte appealed to the Massachusetts Appeals Court which refused to rule on the constitutionality issue.

Petitioners Arabian and Schlichte properly raised the question of constitutionality of the Massachusetts rule and statute by filing a complaint to the United States District Court on February 5, 1975, requesting that the statute and rule be declared in violation of the Equal Protection Clause, that the orders for payment of attorney's fees be declared null and void, that all payments made (especially under the threat of imprisonment) be refunded, and that damages be assessed against each defendant attorney.

On September 7, 1978 the United States District Court for the District of Massachusetts dismissed petitioners' complaint and did not rule on the constitutionality of the statute and rule, (Appendix A, pp. 2a-9a). The basis for federal jurisdiction in the United States District Court was based upon provisions of 28 U.S.C. 1331, 1343(1), 1343(3), and 1343(4).

Petitioners appealed this order and judgment to the United States Court of Appeals for the First Circuit, which noted that petitioners had appealed "from the judgment of the three-judge court properly convened pursuant to 28 U.S.C. 2281." On November 21, 1978 the United States Court of Appeals for the First Circuit subsequently affirmed sua sponte the judgment of the District Court.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This Court has never ruled upon the constitutionality of a state statute and rule which requires husbands to pay the wife's attorney's fees in divorce actions, but not the contrary. This Court has heard and resolved other cases involving constitutional questions relating to a state's intrusion into the family setting when that intrusion results in the allocation of burdens along sexually discriminating lines. In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held that the father of an illegitimate child was entitled to the same presumptions in a custody proceeding that would normally be given to a similarly situated mother. Although the majority of the Court treated the issue involved as one of due

process, four Justices held that Illinois violated the Equal Protection Clause when it made assumptions regarding paternal fitness based on gender. Similarly, this Court held in Stanton v. Stanton, 421 U.S. 7 (1975), that a state cannot allocate paternal and marital responsibilities differently with respect to children of different gender. Other gender-based discrimination cases concerning a family or marital setting heard by this Court, challenging the validity of state statutes include Reed v. Reed, 404 U.S. 71 (1971), Kahn v. Shevin, 416 U.S. 351 (1974), and Orr v. Orr, 77-1119 (pending).

In Levy v. Louisiana, 391 U.S. 68 (1968), this Court held that the Louisiana Wrongful Death Act which differentiated between illegitimate and legitimate children was in violation of the Equal Protection Clause because similarly situated children were not given similar causes of action under the statute. In like manner, similarly situated parties in a divorce action in Massachusetts are never given similar treatment, since a woman always has a right of action for an award of attorney's fees, but never a man. Faced with the fact that the challenged statute and rule do not accord men the same rights as similarly situated women, the issue of this petition is whether the discriminatory treatment is justified by important governmental objectives and is substantially related to those objectives.

The Massachusetts Probate Court held in Kramer v. Kramer, #95598, Gilmore v. Gilmore, # 96199, and House v. House, 368 Mass., 120, 1975, that Rule 47 unconstitutionally denied husbands the equal

protection of the laws because it failed to extend to them the same privileges that it granted wives. Although the Massachusetts Supreme Judicial Court reversed in House, saying that Rule 47 did not discriminate on the basis of sex even though the Rule itself did not apply to husbands, no awards had ever been made that a wife pay the husband's attorney's fees in any divorce proceedings in Massachusetts. This fact alone suggests and substantiates that discrimination does indeed exist in the awarding of attorney's fees.

In the United States District Court in Schlichte v. Gay, 73-3111-C, 1974, the magistrate's report states that the Court has found no cases in which a husband has been granted the same rights as the wife under this rule or statute. The magistrate concludes that there is a substantial question with respect to the constitutionality of Probate Rule 47 and Mass. Gen. Laws Chap. 208, Sec.17.

In 1975, the Massachusetts legislature apparently recognized the unconstitutionality and absurdity of Mass. Gen. Laws Chap. 208, Sec. 17, and as a result, they made minor technical amendments to eliminate all reference to sex; however, since petitioners were injured under the old provisions of the statute, these amendments have no bearing on the issues presented in this petition. Nevertheless, even as amended in 1975, Massachusetts General Laws, Chapter 208, Section 17 still unconstitutionally discriminates against the husband as applied.

CONCLUSION

The question presented in this petition is substantial and of public importance, and therefore, requires plenary consideration, with brief on the merits and oral arguments, for its resolution.

Respectfully submitted,

Ralph H. Arabian, pro se

Robert E. Schlichte, pro se

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-8119

RALPH H. ARABIAN, ET AL.,
Plaintiffs, Appellants.,

v.

JOSEPH AYOUB, ET AL.,
Defendants, Appellees.

MEMORANDUM AND ORDER

Entered November 21, 1978

Plaintiffs appeal from the judgment of the three-judge court properly convened pursuant to 28 U.S.C. 2281. In so far as this Court has jurisdiction over the appeal, see 28 U.S.C. 1253, we find plaintiffs' claim without merit. Accordingly, we affirm sua sponte the judgment of the three-judge court under our Rule 12.

So ordered.

By the Court
/s/ Dana H. Gallup
Clerk

(Cert. cc: Clerk, USDC., Mass.; cc: Messrs. Arabian, Schlichte, Kelly, Hurley, Asack, Locke and Hayes.)

APPENDIX A

UNITED STATES DISTRICT COURT

RALPH H. ARABIAN ET AL.,
Plaintiffs,

v.

JOHN J. DALEY ET AL.,
Defendants.

CIVIL ACTION
NO. 75-446-G

JUDGMENT

September 7, 1978

Upon consideration of the complaint, and supporting and opposing memoranda of law, it is ordered and adjudged that the complaint be dismissed for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P., in accordance with the Memorandum of Decision filed contemporaneously herewith.

/s/ Frank M. Coffin
U.S. Circuit Judge
/s/ W. Arthur Garrity, Jr.
United States District Judge
/s/ Frank H. Freedman
United States District Judge

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

RALPH H. ARABIAN ET AL.,
Plaintiffs,

v.

JOHN J. DALEY ET AL.,
Defendants.

CIVIL ACTION
NO. 75-446-G

MEMORANDUM OF DECISION ON MOTION TO DISMISS

September 7, 1978

GARRITY, J. This case is before the court pursuant to 28 U.S.C. 2281.[1] Plaintiffs claim that the enforcement of Mass. Gen. Laws chapter 208, section 17

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[1] 28 U.S.C. 2281, mandating a three-judge district court in certain circumstances has been repealed with respect to actions commenced after August 12, 1976. See, 90 Stat. 1119 (1976). Plaintiffs, however filed their complaint in 1975, so Section 2281 applies.

(hereinafter, Section 17)[2] and Mass. Probate Court Rule 47 (hereinafter, Rule 47)[3] deny them equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. 1981,

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[2] At the time the original complaint was filed and prior to the 1975 Amendment, see, note 7, infra, Section 17 read as follows:

> Pendency of libel; allowance; alimony. The court may require the husband to pay into court for the use of the wife during the pendency of the libel an amount to enable her to maintain or defend the libel, and to pay to the wife alimony during the pendency of the libel.

[3] Mass. Probate Court Rule 47 provides:

> An application by a wife for an allowance to enable her to defend or prosecute a libel shall contain a statement that she intends in good faith to defend or prosecute such libel, and shall be accompanied by a certificate of her attorney that he believes such statement to be true. If such allowance is granted, it shall be paid as the court may direct.

1985(3) and 1988.[4] They request declaratory and injunctive relief in addition to damages.

Each of the wives of plaintiffs, husband-parties to divorce libels, through her attorney, applied to the Probate Court pursuant to Section 17 and Rule 47 to require her husband to pay the attorney's fees she incurred in connection with the divorce action. The Probate Court granted several of these applications, and plaintiffs paid the sums rather than face contempt. Plaintiffs now challenge the constitutionality of Section 17 and Rule 47, arguing that both provisions discriminate on the basis of sex by allowing a wife to obtain counsel fees from her husband without according the husband a similar privilege. In addition they object that awarding counsel fees against husbands inhibits them from exercising their right of access to the courts to adjudicate claims arising out of divorce actions.

Defendants each move to dismiss the complaint on several grounds, and these motions are now under consideration by this court. The issues have been thor-

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[4] Plaintiffs also claim violations of 18 U.S.C. 241 and 242 and 28 U.S.C. 2201, 2202, and 2284. These allegations are misplaced. 18 U.S.C. 241 and 242 are criminal statutes, and plaintiffs have no standing to complain of their violation. 28 U.S.C. 2201 and 2202 concern only the availability of declaratory relief. 28 U.S.C. 2284 outlines three-judge court procedures and, like sections 2201 and 2202, confers no substantive rights.

oughly briefed and the applicable law is clear; no purpose would be served by hearing oral argument. After reviewing the parties' briefs and for the reasons outlined in this opinion, we grant defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), since plaintiffs have failed to state a claim upon which relief can be granted. In light of this disposition, it is unnecessary to express any opinion concerning the other grounds urged in support of defendants' motions, viz., plaintiffs' failure to join necessary parties under Rule 19, Fed. R. Civ. P., and plaintiffs' failure to comply with Rule 8, Fed. R. Civ. P. Defendants also assert a lack of subject matter jurisdiction and the absence of an actual controversy between the parties. Although not all the defendants raised all of these arguments, each defendant did maintain that plaintiffs had failed to state a claim upon which relief could be granted.

Subsequent to the filing of the original complaint in this action, the Massachusetts Supreme Judicial Court in House v. House, 1975, 368 Mass. 120, addressed the identical equal protection argument presented by the plaintiffs in the instant case. House involved the denial of a wife's application for counsel fees made at the time of the grant of a decree nisi in her divorce action. The Probate Court judge held that Rule 47, upon which the wife relied, unconstitutionally denied husbands the equal protection of the laws because it failed to extend to them the same privileges that it granted wives. The Supreme Judicial Court reversed, concluding that the statutory scheme governing counsel fees in divorce actions taken

as a whole did not discriminate on the basis of sex. Contrary to the assumption of the probate judge, the court held that Rule 47 conferred no right to counsel fees in divorce cases; it merely specified the requirements that a wife's application must meet. 368 Mass. at 121. Although Rule 47 itself does not apply to husbands, the court found that the same good faith showing must nevertheless be made by a husband seeking counsel fees from his wife. 368 Mass. at 121. Since procedural burdens are identical for both husband and wife, Rule 47 does not discriminate on the basis of sex.

Turning to the question of the Probate Court's power to approve applications for counsel fees, the Supreme Judicial Court held that Mass. Gen. Laws c. 208, sec. 38, grants that authority without regard to the sex of the applicant, even though sec. 17, as it read at the time of the House decision, conferred the same power only in connection with a wife's petition. 368 Mass. at 121-2. The court's interpretation of the statutory scheme avoided the need to decide the constitutional question since the provisions as a whole accorded husbands and wives equal treatment. [6]

[6] In their supplementary memorandum discussing the significance of the House decision, plaintiffs argue that Mass. Gen. Laws c. 261, s. 13 and 23 together limit the counsel fees obtainable in divorce actions to a nominal amount. Section 13, however, expressly states that its cost figures are "in addition to other disbursements allowed by law." Mass. Gen. Laws c. 260, s. 17 and 38, are such "laws" comprehended by this clause, laws that in divorce actions permit fees greater than the nominal amounts specified by Sec 13. See, Fuller v. Trustees of Deerfield Academy, 1925, 252 Mass. 258.

Moreover, after the decision in the House case, Section 17 was amended to eliminate all reference to sex. See, St. 1975 ch. 400, sec. 21. Husbands and wives may now rely on both Sections 17 and 38 to obtain counsel fees from the opposing party. [7]

Plaintiffs also complain that ordering them to pay counsel fees chills them from exercising their right of access to the courts to adjudicate disputes in connection with their divorce actions. Although it is not entirely clear from the complaint, plaintiffs appear to be arguing that because they face the prospect of paying counsel fees into court during the pendency of a libel, they are chilled from making use of the probate courts and thus denied due process of law. See, Boddie v. Connecticut, 1971, 401 U.s. 371. So stated, the claim is completely without merit.

The award of counsel fees pursuant to Mass. Gen. Laws c. 208, s. 17 and 38 is within the discretion of the Probate Court, see, Clifford v. Clifford, 1968, 354 Mass. 545, 549, 238 N.E. 2d 522. In the exercise of its discretion, the court considers, among other factors, the abil-

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[7] Section 17 now reads:

> Pendency of action; allowance; alimony. The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action and to pay to him alimony during the pendency of the action.

ity of each spouse to pay the fees and grants the application only in the event that the applicant is unable to pay his own costs and the opposing party is capable of paying all fees. See, Hano v. Hano, 1977, Mass. App. Adv. Sh. 1085, 1089, 367 N.E. 2d 1190. This situation is quite unlike that involved in Boddie v. Connecticut, 1971, 401 U.S. 371. No party to the instant case is foreclosed from prosecuting or defending a libel because of a fixed, non-waivable access fee. An allegation of a mere chill is insufficient to sustain plaintiffs' due process claim. See, Ortwein v. Schwab, 1973, 401 U.S. 656, U.S. v. Kras, 1973, 409 U.S. 434.

Defendants' motion, therefore, is granted, and plaintiffs' complaint is hereby dismissed.

/s/ W. Arthur Garrity, Jr.
United States District Judge

APPENDIX B

A.C. 7 Div.

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss. Probate Court

Respectfully represents Patricia Marie Arabian of Brockton in the County of Plymouth, the respondent in a libel for divorce that she believes she has a good cause of action and intends in good faith to defend and to use for such defense any allowance made.

Wherefore she prays that Ralph H. Arabian of Framingham in the County of Middlesex, the libellee, may be required to pay into Court for her use a sum to enable her to maintain said libel.

Dated this 23rd day of August 1971.

/s/ Patricia Arabian
Libellant

I believe the above statement to be true.
/s/ Joseph S. Ayoub, Attorney

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss. Probate Court

Ordered that the Libellee pay into Court the sum of eight-hundred dollars; four hundred dollars on or before September 10, 1971, four hundred dollars on or before November 4, 1971 , as an allowance to said libellant.

Said sum may be paid by the Register to the attorney for the libellant.

/s/ James R. Lawton
Judge of Probate Court

Sept. 8, 1971

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

To the Honorable the judge of the probate court in and for the County of Plymouth:

In the matter of petition for modification filed by Ralph H. Arabian of the court order, entered on September 8, 1971 Docket #83290 (sic) Now comes Patricia Marie Arabian, respondent and moves that the petitioner, Ralph H. Arabian, be ordered by the court to pay counsel fees to the respondent, Patricia Marie Arabian in advance so that she may defend this action.

/s/ Patricia M. Arabian

November 13, 1972

Plymouth, ss. Probate Court

The within motion is hereby allowed. Libellee shall pay $200.00 forthwith.

/s/ James R. Lawton
Judge of Probate Court

For respondent:

Joseph S. Ayoub
27 State St.
Boston, Mass. 02109
523-6300

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

To the Honorable the judge of the probate court in and for the County of Plymouth:

In the matter of petition brought by Ralph H. Arabian v. Patricia M. Arabian for modification of court order entered 9-8-71. Now comes respondent, Patricia Marie Arabian and moves that the petitioner, Ralph H. Arabian, be ordered to pay counsel fees for appearance of Attorney Joseph S. Ayoub at a hearing scheduled for Thursday, December 14, 1972 on motion of Ralph H. Arabian to vacate an order requiring him to pay forthwith $200 for costs of taking deposition.

/s/ Patricia M. Arabian

December 8, 1972

Plymouth, ss. January 18, 1973

Counsel fees in the sum of one hundred fifty ($150) dollars for appearance on this date to be paid to Paul P. Hayes, Jr., Esquire.

/s/ Alfred Knight
Acting Judge of Probate Court

For respondent:

Joseph S. Ayoub
27 State St.
Boston, Mass. 02109
523-6300

APPENDIX B

(General Laws Ch. 208, Sec. 17)
A.C. 7 (Divorce)

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Probate Court

Respectfully represents Marie C. Schlichte of Quincy in the County of Norfolk the Petitioner in a petition for contempt that she believes she has a good cause of action and intends in good faith to prosecute it and to use for such prosecution any allowance made.

Wherefore she prays that Robert E. Schlichte of Boston in the County of Suffolk, the respondent may be required to pay into Court for her use a sum to enable her to maintain-defend said libel.

Dated this 8th day of August 1973.

/s/ Marie C. Schlichte
Petitioner

I believe the above statement to be true.

/s/ John K. McNabb, Attorney

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Probate Court

Ordered that the libellant pay into Court the sum of One Hundred (100) dollars on or before October 1, 1973 as an allowance to said libellant.

Said sum may be paid by the Register to the attorney for the libellant.

/s/ J.J. Fox

Aug. 8, 1973 Judge of Probate Court

Supreme Court, U. S.
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SUPPLEMENTAL BRIEF OF PETITIONERS

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Andover, Massachusetts
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312 LaGrange Street
W. Roxbury, Massachusetts
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SUPPLEMENTAL BRIEF OF PETITIONERS

This supplemental brief is filed pursuant to Rule 24 (5) calling attention to new pertinent information which was not available at the time petition for writ of certiorari was docketed.

This Court recently decided on March 5, 1979, Orr v. Orr, No. 77-1119, and the issues raised are closely related to those in the instant case. The decisions of this Court in Orr, supra support the issues raised in petitioners' writ of

certiorari. Appellant Orr questioned the constitutionality of Alabama's alimony statutes which provided that husbands but not wives may be required to pay alimony upon divorce. He requested that Alabama's alimony statutes be declared unconstitutional because they authorized courts to place an obligation of alimony upon husbands but never upon wives. Appellant Orr contended that the Alabama statutes on alimony, by virtue of their reliance on a gender-based classification violated the Equal Protection Clause of the Fourteenth Amendment. Because of the Alabama statutes, the lower court had ordered Appellant Orr to pay back alimony and attorney's fees.

APPLICATION OF ORR TO INSTANT CASE

1. Petitioners are questioning the constitutionality of a Massachusetts rule and statute, similar to that of Alabama, which provided that husbands but not wives may be required to pay attorney's fees for the wife upon divorce.

2. This Court decided in Orr, supra that appellant's failure to ask for alimony for himself did not deprive him of standing to attack the constitutionality of the Alabama statutes for underinclusiveness. Additionally, the Court found that there is no question that Appellant Orr bears a burden he would not bear were he female. Similarly, in the instant case, petitioners' failure to ask for attorney's fees for themselves should not deprive them of standing to attack the constitutionality of the Massachusetts statute and rule. Indeed, both petitioners Arabian and Schlichte bear a burden similar to that of Appellant Orr.

3. In Orr, supra, this Court found that Alabama's statutory scheme of imposing alimony obligations on husbands but not on wives on the basis of sex violated the Equal Protection Clause of the Fourteenth Amendment and agreed that the old notion that "generally it is the man's primary responsibility to provide a home and its essentials" can no longer justify a statute that discriminates on the basis of gender. The same conclusions should be drawn in the instant case regarding the awarding of attorney's fees for the wife upon divorce in Massachusetts. Petitioners allege, as in Orr, supra, that the Massachusetts statute and rule on attorney's fees, in effect at the time petitioners filed their complaint and as applied by the Massachusetts Probate Courts, by virtue of their absolute reliance on a gender-based classification, violates the Equal Protection Clause of the Fourteenth Amendment. (Petition, p.4)

CONCLUSION

The State of Massachusetts, like the State of Alabama, cannot be permitted to classify on the basis of sex, either by statute or as applied; therefore, this Court should apply the same principles and conclude as it did properly in Orr, supra, that the Massachusetts statute and rule governing attorney's fees in divorce, at the time petitioners filed their complaint, are unconstitutional, and that

all orders for attorneys' fees be vacated.

Respectfully submitted,

Ralph H. Arabian, pro se

Robert E. Schlichte, pro se

Supreme Court, U. S.
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JOHN J. DALEY ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent John J. Daley in Opposition.

GEORGE N. ASACK,
16 Cottage Street,
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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1279.

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JOHN J. DALEY ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent John J. Daley in Opposition.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit, entered on November 21, 1978, is reported as Ralph H. Arabian et al. v. Joseph Ayoub et al., Case No. 78-8119, and appears on page 1a of petitioners' Appendix A, included in the petition for certiorari. The court held that the petitioners' claim was without merit and the judgment of the United States District Court was affirmed. That judgment appears on page 2a of petitioners' Appendix A, and in that court the complaint was dismissed for failure to state a claim

upon which relief could be granted under Rule 12(b)(6), Fed. R. Civ. P. A memorandum of decision was filed therewith and appears on pages 3a-9a of petitioners' Appendix A.

Questions Presented for Review.

The petitioners are seeking a determination that Mass. G.L. c. 208, § 17, and Massachusetts Probate Court Rule 47, relating to the authority of a court to award attorneys' fees in a divorce action, are unconstitutional. The Probate Rule, Mass. Probate Court Rule 47, as it existed before being repealed in 1975, appears on page 4a of petitioners' Appendix A included in the petition for writ of certiorari filed herein. The statute, Mass. G.L. c. 208, § 17, as it existed prior to amendment in 1975, appears on page 4a of Appendix A. The specific question presented by the petitioners is whether the statute and rule violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981, 1985(3) and 1988. They are seeking an award of damages as well as declaratory and injunctive relief.

Counter-Statement of Facts.

Each of the petitioners' wives, in their divorce actions in the Plymouth County Probate Court, applied through her attorney for payment of attorneys' fees. These applications were made pursuant to former section 17 and former Rule 47. The wives of the petitioners were successful in their applications and the petitioners paid the sums ordered by the Probate Court. As a result of the action of the Probate Court in so

ordering the petitioners to pay their wives' attorneys' fees, the petitioners brought a complaint in the United States District Court on February 5, 1975, requesting that the statute and the rule be declared unconstitutional as violative of the Equal Protection Clause. Their contention in that action was that the former section 17 and Rule 47 discriminate on the basis of sex by allowing a wife to obtain counsel fees from her husband without according the husband a similar privilege.

The respondent John J. Daley is the Register of Probate in Plymouth County, Massachusetts, and held that position at the time of the application and award to the wives of petitioners. Respondent Daley was not responsible for the award of fees made in this case at the Plymouth County Probate Court. The respondent's duties are administrative in nature, and he played no part in the interpretation of Massachusetts law, nor does he participate in decisions made by the court pertaining thereto.

In 1975, after the filing of the complaint in this matter, the Massachusetts Supreme Judicial Court, in *House* v. *House*, 368 Mass. 120 (1975), held that the Massachusetts statutes pertaining to counsel fees in divorce actions were not, when taken as a whole, violative of the Equal Protection Clause of the Fourteenth Amendment. That case involved the denial of a wife's application for counsel fees made at the time of the grant of a decree nisi in her divorce action.

In discussing Rule 47, the court found no problem of discrimination based on gender. Rather, the court held that the Rule itself does not create any right to attorneys' fees in divorce cases. The purpose of the rule, as interpreted by the court, is to specify the requirements that a wife must meet in her application for counsel fees. 368 Mass. at 121. The court found that the same standards that must be met by wives would apply to husbands seeking such fees in divorce actions

and this is true despite the absence of any specific language pertaining thereto. 368 Mass. at 122.

Since the highest court in the Commonwealth has held that the requirements of the rule are to apply in an even-handed manner to both husbands and wives, there can be no basis for an argument that the statute is violative of the Equal Protection Clause. The rule deals merely with the procedural requirements for applying for counsel fees in divorce proceedings, and in Massachusetts there is absolutely no discrimination based on sex as applied in light of the *House* case.

Once the procedural burdens of Rule 47 are met by a party, the Probate Court has the authority to approve these applications pursuant to Mass. G.L. c. 208, §§ 17 and 38. Although section 17 as it existed at the time of the *House* case gave the Probate Court the power to grant attorneys' fees to a wife only, that case held that Mass. G.L. c. 208, § 38, empowers the court to grant fees to both husbands and wives. 368 at 122.

In effect, then, although the specific statute contended to be discriminatory deals with the awarding of attorneys' fees to wives only, the Massachusetts law, taken in its entirety, in no way discriminates against husbands in divorce actions seeking attorneys' fees. Procedurally, Rule 47 and the common law, through the *House* case, provide a basis for applications for attorneys' fees to husbands and wives equally. Substantively, there are the two sections of Mass. G.L. c. 208, namely, sections 17 and 38. Together they provide the basis for such awards on an equal basis.

Argument.

Mass. G.L. c. 208, § 38, read at the time of the original complaint in this case (and still reads): "In any proceeding

under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them."

This matter was discussed in the *House* case where it was held that section 38 gives the Probate Court the power to award costs and expenses, including counsel fees, to either party. Another decision of the Massachusetts Supreme Judicial Court which held that section 38 applied to counsel fees for either party in a divorce proceeding is *Kelley* v. *Kelley*, Mass. Adv. Sh. (1978) 816, 817, 374 N.E. 2d 580.

In light of the holdings of these Massachusetts cases and their interpretations of the Massachusetts statutes dealing with this problem, there is no constitutional question for this Court to decide. It was held in *General Investment & Service Corp.* v. *Wichita Water Co.*, 236 F. 2d 464, 468 (10th Cir. 1956), that in cases which involve state laws there are certain considerations which require federal courts to refrain from exercising jurisdiction when the parties have an adequate determination in the state court. This comes under the general heading of comity, and it is suggested that the instant case is just such a controversy and that such restraint should be exercised.

There is no case or controversy in this matter, in that the petitioners have never been denied counsel fees and in fact have not even applied for them. That being true, they have no standing to complain that they were not afforded equal protection of the laws. Certainly, if they met the necessary standards under Massachusetts law for the awarding of counsel fees in such cases, Massachusetts law would mandate that they be so awarded. That is not the case here though, and it is respectfully suggested that to decide the issue raised by the

petitioners would simply be to deal with abstract issues of law which have no vitality in the present case.

It was found by the Court of Appeals that there was no merit to the petitioners' claim of a violation of the Equal Protection Clause of the Fourteenth Amendment, and the complaint was ordered dismissed. There is no important issue of law which the petitioners present in their petition. This Court has held that where there is no issue which is of importance to the public as a whole, or which need be decided to resolve substantial conflicts in the Circuit Courts, certiorari should not be granted. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Conclusion.

Wherefore, respondent John J. Daley respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
APR 23 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1279.

RALPH H. ARABIAN ET AL.,
PETITIONERS,

v.

JOHN J. DALEY ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent Joseph S. Ayoub in Opposition.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1279.

RALPH H. ARABIAN ET AL.,
PETITIONERS,

v.

JOHN J. DALEY ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent Joseph S. Ayoub in Opposition.

Opinion Below.

The opinion of the Court of Appeals for the First Circuit, entered on November 21, 1978, appears on page 1a of petitioners' Appendix A, included in the petition for writ of certiorari filed herein; that court found petitioners' claim to be without merit and affirmed sua sponte the judgment of the three-judge District Court.

The judgment of the three-judge court, entered on September 7, 1978, appears on page 2a of petitioners' Appendix A, included in the petition for writ of certiorari filed herein; that court ordered and adjudged that the complaint be dismissed for failure to state a claim upon which relief could be granted under Rule 12(b)(6), Fed. R. Civ. P., in accordance with the memorandum of decision filed contemporaneously therewith.

The aforesaid memorandum of decision on motion to dismiss, dated September 7, 1978, appears on pages 3a-9a of petitioners' Appendix A, included in the petition for writ of certiorari filed herein.

Questions Presented for Review.

The petitioners herein seek to have a certain statute, Mass. Gen. Laws c. 208, § 17, and a probate rule, Massachusetts Probate Court Rule 47 (both of which were amended and/or repealed in 1975[1]), declared unconstitutional; these related

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[1]The rule and statute as they now appear:

"SUPPLEMENTAL RULES OF PROBATE COURT PURSUANT TO RULE 83 MASSACHUSETTS RULES OF CIVIL PROCEDURE.

"Effective July 1, 1975.

"Rule 406. *Allowance to Defend.*

"An application by a party for an allowance to enable him to defend or prosecute a complaint shall contain a statement that he intends in good faith to defend or prosecute such complaint, and shall be accompanied by a certificate of his attorney that he believes such statement to be true. If such allowance is granted, it shall be paid as the court may direct.

"*Comment*: This rule restates, with one modification, Probate Rule 47."

to the authority of a court to award attorney's fee in a divorce case. *The probate rule*, Massachusetts Probate Court Rule 47, as it existed before being repealed, appears on page 4a of petitioners' Appendix A included in the petition for writ of certiorari filed herein. *The statute*, Mass. Gen. Laws c. 208, § 17, as it existed prior to being amended in 1975, appears on page 4a of said Appendix A.

Counter-Statement of Facts.

The petitioners claim that the enforcement of former Mass. Gen. Laws c. 208, § 17 (hereinafter, Section 17), and former Massachusetts Probate Court Rule 47 (hereinafter, Rule 47) deny them equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981, 1985(3) and 1988. They request declaratory and injunctive relief in addition to damages.

MASSACHUSETTS GENERAL LAWS, CHAPTER 208.

Domestic Relations.

§ 17. [Pendency of action; allowance; alimony.]

"The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action, and to pay to him alimony during the pendency of the action." (Amended by St. 1975, c. 400, § 21.)

1975 Amendment: St. 1975, c. 400, § 21, approved July 2, 1975, and by § 79 made effective July 1, 1975, rewrote the section.

St. 1975, c. 400, conformed the General Laws to the Massachusetts Rules of Civil Procedure governing domestic relations proceedings, also effective July 1, 1975.

Each of the wives of the petitioners, husband-parties to divorce libels, through her attorney, applied to the Probate Court pursuant to former Section 17 and former Rule 47 to require her husband to pay the attorney's fees she incurred in connection with the divorce action. The Probate Court granted several of these applications, and petitioners paid the sums rather than face contempt. The petitioners now challenge the constitutionality of the *former* Section 17 and Rule 47, both of which were repealed in 1975, arguing that both provisions discriminate on the basis of sex by allowing a wife to obtain counsel fees from her husband without according the husband a similar privilege.

The respondent, Joseph S. Ayoub (hereinafter, Ayoub), is a lawyer and was engaged by Patricia Arabian (hereinafter, Mrs. Arabian) to represent her in her action for divorce against her husband, Ralph H. Arabian, one of the petitioners in the present proceedings, which divorce was pending in Plymouth Probate Court, No. 20404, in Massachusetts; he represented Mrs. Arabian during the approximate period commencing October 26, 1970, to December, 1972; in the course of the divorce proceedings, acting under former Mass. Gen. Laws c. 208, § 17,[2] and Massachusetts Probate Rule 47,[3] he applied to the Probate Court pursuant to former Section 17 and former Rule 47 to require petitioner Arabian to pay his fees incurred in connection with the divorce action; the Probate Court granted the application.

There is no case or controversy existing between the petitioner Schlichte and the respondent Ayoub. *Ayoub did not appear or represent either of the parties in the Schlicte divorce proceedings.*

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[2]Section 17 was repealed in 1975.

[3]Rule 47 was repealed in 1975.

Subsequent to the filing of the original complaint in this action, the Massachusetts Supreme Judicial Court in *House* v. *House*, 368 Mass. 120 (1975), addressed the identical equal protection argument presented by the petitioners in the instant case. *House* involved the denial of a wife's application for counsel fees made at the time of the grant of a decree nisi in her divorce action. The Massachusetts Supreme Judicial Court held that the statutory scheme governing counsel fees in divorce actions, taken as a whole, did not discriminate on the basis of sex. Contrary to the assumption of the probate judge, the court held that Rule 47 conferred no right to counsel fees in divorce cases; it merely specified the requirements that a wife's application must meet. 368 Mass. at 121. Although Rule 47 itself does not apply to husbands, the court found that the same good faith showing must nevertheless be made by a husband seeking counsel fees from his wife. 368 Mass. at 121. *Since procedural burdens were identical for both husband and wife, former Rule 47 under the general statutory scheme did not discriminate on the basis of sex.*

Turning to the question of the Probate Court's power to approve applications for counsel fees, the Supreme Judicial Court held that Mass. Gen. Laws c. 208, § 38, *grants that authority without regard to the sex of the applicant*, even though Section 17, as it read at the time of the *House* decision, conferred the same power only in connection with a wife's petition. 368 Mass. at 121-122. *The court's interpretation of the statutory scheme avoided the need to decide the constitutional question, since the provisions as a whole accorded husbands and wives equal treatment.*

Moreover, after the decision in the *House* case, Section 17 was amended to eliminate all reference to sex. *See* St. 1975, c. 400, § 21. Husbands and wives may now rely on both Sections 17 and 38 to obtain counsel fees from the opposing party.

Argument.

There does not appear to be any actual conflict with the decisions of this Court or of any other circuit, and no important questions of federal law not previously adequately dealt with by this Court or by the State Supreme Court are raised in the present proceedings.

I. There are No Special or Important Reasons for Granting Review on Writ of Certiorari on this Petition.

This Court decided, on March 5, 1979, *Orr* v. *Orr*, No. 77-1119, and the issues raised in *Orr* are closely related to those issues raised in the present proceedings. The decision in *Orr, supra*, does not support the issues raised by the petitioners in their petition for writ of certiorari filed herein. In *Orr, supra*, the appellant questioned the constitutionality of Alabama's alimony statutes, *which specifically provided that husbands but not wives may be required to pay alimony upon divorce.*

Application of Orr to Instant Case.

The *Orr* case must be distinguished on the facts which exist in the instant case.

The Massachusetts statutory scheme *is not the same as the Alabama statutory scheme referred to in Orr.* In Massachusetts the statutory scheme permitted and still permits *both husband and wife* to seek counsel fees. *See House, supra*, which sets forth the Massachusetts statutory scheme permitting applications for counsel fees by both parties to divorce, *without regard to the sex of the applicant.* We respectfully suggest that the *House* case is dispositive of the present proceedings.

See also Kelley v. *Kelley*, decided by the Massachusetts Supreme Judicial Court on March 31, 1978, Mass. Adv. Sh. (1978) 816, 374 N.E. 2d 580. In *Kelley, supra*, the Massachusetts Supreme Judicial Court stated:

> "However, he has apparently either overlooked or ignored the fact that G.L. c. 208, § 38, was amended by St. 1933, c. 288, to read: 'In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs *and expenses, or either*, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them' (emphasis supplied). In *House* v. *House*, 368 Mass. 120, [330 N.E. 2d 152, 153] (1975), we referred to the 1933 amendment as follows: 'Since that amendment we have acknowledged that under § 38 "the court now undoubtedly has power to award costs and expenses, which may include counsel fees, and may order them to be paid to counsel for the opposing party."'" Mass. Adv. Sh. (1978) at 817.

The holdings of the Massachusetts Supreme Judicial Court do not bar either of the petitioners from obtaining relief in the state courts under proper circumstances, as outlined in *House*.

II. The Jurisdiction of this Court over the Constitutional Challenge Asserted by the Petitioners in this Case is Questioned in View of the Decision of the Massachusetts Supreme Judicial Court in the House Case, Supra.

The Massachusetts statutory scheme does not reflect any discrimination on the basis of sex. The Massachusetts Supreme

Judicial Court's interpretation of the statutory scheme avoids the need to decide the constitutional question since the provisions as a whole accorded husbands and wives equal treatment.

Moreover, after the decision in the *House* case, Section 17 was amended to eliminate all reference to sex. *See* St. 1975, c. 400, § 21. Husbands and wives may now rely on both Sections 17 and 38 to obtain counsel fees from the opposing party. Rule 47 was also amended in 1975, as appears above.

III. The Litigation Between the Parties Hereto does Not Present a "Case or Controversy" Within the Meaning of Article III of the United States Constitution.

It is to be noted that the respondent Ayoub did not participate in any way in the Schlicte divorce case referred to on page 5 of the petition for writ of certiorari filed herein; no case or controversy is present insofar as the respondent Ayoub is concerned.

As to the petitioner Arabian, in view of the *House* case, Arabian's remedy, if any, is available in the state courts. The equal protection question raised in this case has been mooted by the decision in the *House* case, *supra*; no case or controversy is present insofar as respondent Ayoub is concerned. *See* in this connection *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 83 (1975). It is to be noted that the petitioner Arabian in the case at bar did not file an application for counsel fees in connection with the Arabian divorce proceedings.

We respectfully suggest that this Court should not "sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs . . .. If no such right exists, the delicate duty of declaring by this court that an act of State legislation is void, is

an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit." *Supervisors* v. *Stanley*, 105 U.S. 305, 311, 312 (1881). It is quite clear that the petitioners have not met the burden of proving that they were harmed as the result of an unconstitutional statute.

IV. The Respondent Ayoub is Immune from Suit in the Present Proceedings.

It is clear that the respondent Ayoub was at all times acting as a private attorney under a valid statute and rule and as such was immune from liability.

Attorneys who participate in the trial of private state court litigation are not acting under "color of state law" within the meaning of § 1983. *Meier* v. *State Farm Mutual Auto. Ins. Co.*, 356 F. 2d 504, 505 (7th Cir. 1966), cert. denied, 385 U.S. 875 (1966). The respondent attorneys, whose acts were those of an attorney as performed in his professional capacity, did not act as state officials, notwithstanding that they were officers of the court. Their conduct complained of was not action taken under "color of state law" within the meaning of § 1983. *Jones* v. *Jones*, 410 F. 2d 365, 366 (7th Cir. 1969), cert. denied, 396 U.S. 1013 (1970). *Milliman* v. *Friedrich*, 42 U.S.L.W. 3230, No. 73-468 (8th Cir. April 17, 1973), cert. denied, 414 U.S. 1066 (1973).

It is clear, therefore, that an attorney does not act under "color of state law" when representing a client.

V. Rules of Comity and Abstention Should Operate so that this Court Abstains from Exercising Jurisdiction in the Instant Case.

It was held in *General Investment & Service Corp.* v. *Wichita Water Co.*, 236 F. 2d 464, 468 (10th Cir. 1956), that:

"The principle is well established and without dispute that under the rule of comity under our dual system of Government in cases involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need to be cited to support this statement. It is recognized without exception."

VI. A Class Action is Not Maintainable by the Petitioners.

We believe this issue has been waived by the petitioners since it is not argued or set forth in the petition for writ of certiorari.

VII. Marriage — Divorce — Alimony.

It is within the exclusive jurisdiction of the states to regulate and control marriage and divorce within their respective borders. *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946). *Harris* v. *Turner*, 329 F. 2d 918, 923 (6th Cir. 1964), cert. denied, 379 U.S. 907 (1964), reh. denied, 379 U.S. 985 (1965).

VIII. General Argument.

The Court of Appeals correctly found that the petitioners' claim was without merit (Pet. App. A, 1a) and the three-judge court ordered the complaint be dismissed in accordance with the memorandum of decision (Pet. App. A, 2a-9a).

An examination of the petition reveals that it involves no novel or important questions of law. In *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938), this Court stated: "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

This Court has held that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of . . . authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Respondents respectfully submit that there has been no such showing by this petition.

Conclusion.

Because the petition discloses no special or important reasons for review by this Court, but involves only questions of law which apparently are moot, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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